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IN THE

Supreme Court of the United States

OCTOBER TERM 1963

No. 640

CARL I. COHEN,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, KINGS COUNTY, OR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Petitioner, Carl I. Cohen, prays that a writ of certiorari issue to review the order of the Supreme Court of the State of New York, Kings County, entered in the above entitled case as further described *infra*; or, should such be jurisdictionally more appropriate, to review the respective orders of the Court of Appeals of the State of New York and of a single Judge of that Court, which have also been entered in the above entitled case and which are likewise further described *infra*.

Opinions Below

The memorandum decision of the Supreme Court of New York, Kings County, printed in the appendix hereto *infra*, p. 28, is not reported. The Appellate Division of the Supreme Court of the State of New York, Second Department, in dismissing the appeal, rendered no opinion. The Court of Appeals of the State of New York, and Judge Fuld of that Court, in respectively denying permission or leave to appeal, rendered no opinion.

Jurisdiction

The order of the Supreme Court of the State of New York, Kings County, denying petitioner's motion which sought to institute a distinct proceeding to vacate an *ex parte* telephone wiretap Court order, was entered on February 26, 1963 (appendix, *infra*, pp. 32-33). Petitioner filed timely notice of appeal to the Appellate Division of the Supreme Court of the State of New York, Second Department, on March 22, 1963. The Appellate Division granted a motion by the respondent to dismiss the appeal, on April 17, 1963 (appendix hereto *infra*, p. 26). Petitioner made timely applications, respectively, to a single Judge of the Court of Appeals of the State of New York and to that entire Court for permission or leave to appeal, both of these applications being denied on July 10, 1963 (appendix hereto *infra*, pp. 24-25). Upon timely application, Mr. Justice Harlan granted petitioner an extension of time within which to file a petition for a writ of certiorari to and including November 15, 1963, and prior to the expira-

tion of that time Mr. Justice Harlan further extended the time within which to file a petition for certiorari to and including November 22, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. §1275(3), since the petitioner is claiming rights, privileges or immunities under the Fourth Amendment (unreasonable search and seizure), the Fifth Amendment (self-incrimination) and the Fourteenth Amendment (due process of law) of the Constitution of the United States and under 47 U.S.C. §605; and since there is necessarily drawn in question the validity of a State statute (N.Y. Code Crim. Proc. §813(a)) on the ground of its being repugnant to the Constitution of the United States, and to 47 U.S.C. §605 (as given supremacy by Article VI of the Constitution of the United States). A possible jurisdictional problem (the possible existence of another adequate State remedy) is noted *infra*.

Question Presented

Whether a State Court *ex parte* telephone wiretap order which is challenged by the victim thereof on Federal grounds may be totally and permanently shielded from subsequent judicial review of the constitutionality of such issuance merely because no state statutory procedure for such challenge or review has been provided, or merely because the person seeking such review is unable (i.e., intrinsically and inevitably unable in the nature of the *ex parte* procedural situation with which he is confronted and because he is denied access to the sealed judicial records) to plead or aver a *prima facie* case of unconstitutional issuance of the wiretap order.

Constitutional and Statutory Provisions Involved

The case involves Article VI (supremacy clause), and the Fourth (unreasonable search and seizure), Fifth (self-incrimination) and Fourteenth (due process of law) Amendments of the United States Constitution. It also involves §605 of the Federal Communications Act (U.S.C. Title 47). It also involves the following New York State statutes: Code Crim. Proc. §§813-a, 813-c, 813-d and 813-e; C.P.L.R. §4506, formerly C.P.A. §345-a. These Federal and State statutory provisions are quoted in the appendix hereto *infra*, pp. 34 et seq.

Statement of the Case and of How the Federal Questions are Presented

Our citations to the record will refer principally to the "Record Printed for Court of Appeals on Motion for Permission to Appeal: Consisting of Record of Proceedings in Appellate Division, Second Department, and Supreme Court, Kings County" (cited herein as "RI "), and to the printed "Notice of Motion, Affidavit and Memorandum for Leave to Appeal to Court of Appeals" (cited herein as "RII "). Both of these printed items are included in the certified Record filed herein, and nine extra copies of each of said items are filed herewith. It will also be necessary, for discussion of the previously mentioned possibility of another adequate State remedy, to refer to a parallel pending proceeding the record of which is not presently before this Court.

Petitioner, a physician licensed by the State of New York, was indicted for abortion under five indictments in Novem-

ber, 1960 by the Grand Jury of Kings County, New York (RII 4). These indictments have not yet been brought to trial; the trial awaits the disposition of certain proceedings, including the instant one, that were brought by petitioner for the suppression of evidence.

In order to give this Court the entire relevant procedural setting of the phase of the evidence-suppression controversy to which this petition for certiorari is addressed, it is necessary to refer to a related proceeding for suppression of evidence, which is presently pending in the State courts. The subject matter of the instant certiorari proceedings began with the previously mentioned State court motion (see details *infra*) challenging the validity of an *ex parte* Court order allowing a wiretap of petitioner's private office telephone. Prior to this State court motion of ours challenging the wiretap order, we had brought a State court motion to suppress evidence which we claimed was seized in an illegal search of petitioner's office, as well as to suppress wiretap evidence. The record relating to the latter proceeding for suppression of evidence is the one above referred to as not being before this Court in the instant proceeding but as needing to be referred to here because of the question of "other adequate state remedy."

The aforesaid separate motion-to-suppress proceeding in the State courts is presently pending in the Supreme Court of the State of New York, Kings County, before the Honorable Mr. Justice Rinaldi. The evidentiary hearing before Justice Rinaldi on the motion to suppress was concluded on October 1, 1963. A decision by Justice Rinaldi is expected fairly soon. This will be of interest to this Court, we assume, because of the above mentioned possibility that the

proceeding before Justice Rinaldi may be deemed by this Court to affect the question of other-adequate-State-remedy.

The following further facts relating to the latter motion-to-suppress proceeding are relevant: The indictment of petitioner for abortion in November 1960 had been preceded by an arrest and search on September 3, 1960, during the hours shortly following midnight. Neither the arrest nor the search were made upon a warrant. Petitioner is claiming in the separate motion-to-suppress proceeding that the arrest and search were unconstitutional. Petitioner's person was searched at his home in Neponsit, Queens, where the arrest occurred, and from there the State police officers took petitioner in their automobile to his office in Brooklyn, where the police entered by breaking a rear cellar door lock. The office was intensively searched and office records pertaining to numerous female patients of petitioner were seized. The principal item of these records, a desk diary, which the police admitted seizing, was later said by them to have been "lost" or "misplaced" and it has not been produced by the police to this day.* In examining petitioner's office records the police admitted that they came prepared with lists of names of female patients of petitioner. A prime issue in the motion-to-suppress proceeding is whether these names were the product of antecedent telephone wiretap leads. Petitioner is contending in the motion-to-suppress proceeding that the police information which led to the abortion indictments came either from

* The police claimed consent by petitioner for the search of his office. This consent is denied by petitioner, and in the State court motion-to-suppress proceeding he produced witnesses who were undisputedly present when the consent is supposed to have been given and who denied the police assertions in this regard. Justice Rinaldi's forthcoming decision in the motion-to-suppress proceeding will presumably determine, *inter alia*, this issue of consent.

wiretap leads, or from the "lost" diary seized by the police during the search of his office, or from both of these sources.*

At the time when petitioner first instituted his motion-to-suppress proceeding in the State Court (March 1962) he had no knowledge, but only a suspicion, that his office telephone had been tapped by the police or prior to the search prior to the indictments (November 1960) (September 3, 1963). In April 1962, during one of the early sessions in the State court motion-to-suppress proceeding, petitioner first learned positively that there had been a telephone wiretap, respondent having admitted in open Court that this was the case, that the wiretap had been authorized under an *ex parte* court order issued on July 28, 1960, pursuant to N.Y. Code Crim. Proc. §813-a, and that the wiretap had been maintained from July 29, 1960 until September 2 or 3, 1960 (the latter being the date of petitioner's arrest and of the search of his office).

After this disclosure in April 1962 about the wiretap, the motion-to-suppress proceeding lagged for some months owing to circumstances which are not here pertinent. Then, on January 23, 1963 the State Court in which the motion-to-suppress proceeding was pending ordered an adjournment for the purpose of enabling petitioner to institute a separate proceeding for the exclusive purpose of testing out the validity of the *ex parte* telephone wiretap order. Such separate proceeding was instituted on the following day (January 24, 1963), by a notice of motion in the Supreme Court

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* The motion-to-suppress proceeding also disclosed that the police had lost or destroyed numerous other records, consisting of their own notes and memoranda which they are required by Police Department regulations to keep.

of the State of New York, County of Kings, which came on before Mr. Justice Arkwright of that Court. This was the commencement of the proceeding in which the instant petition for certiorari arises.

The separate proceeding to vacate the *ex parte* wiretap order encountered from the outset the difficulty that there existed no State statutory procedure for such a proceeding. The motion papers were captioned in the same criminal proceeding in which the indictments and the motion to suppress were pending (RI 6), but it was petitioner's theory (see further as to this *infra*) that he was endeavoring to bring on an entirely distinct proceeding which, if necessary, could and should be treated as a proceeding on the civil side of the calendar for the purpose of invoking what petitioner deemed to be the inherent jurisdiction of a State court of general original jurisdiction (the Supreme Court of the State of New York*) to hear and determine a claim of constitutional aggrievement by a citizen (RII 13).

The specific relief sought by the separate proceeding addressed to the wiretap order was the vacating and setting aside of that order after a hearing on the question of whether there had been compliance with the statutory requirements (N.Y. Code Crim. Proc. §813-a**), and for such other and further relief as the Court might consider just and proper (RI 6-10).

Another difficulty encountered by petitioner from the outset of his separate proceeding to vacate the *ex parte*

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* See N.Y. Const. Art. 6, §7(a).

** As will appear, these statutory requirements (quoted in the appendix hereto, *infra*, p. 35) import (or they should import in order to satisfy Federal Constitutional standards) the Federal Fourth Amendment standards of reasonable search.

wiretap order was, of course, that, as petitioner stated in his moving papers in that proceeding, "the precise contents of any affidavit submitted in support of the application for a court order is not known to the defendant [i.e., the present petitioner], nor can the defendant or his counsel state with certainty the substance of the information furnished to the Court [i.e., the Court which had issued the *ex parte* wiretap order]"; this very circumstance, however, petitioner urged, entitled him "to a hearing to determine whether the information submitted to the Court was legally sufficient to support the *ex parte* order authorizing the telephone interception" (RI 9-10).

The affidavit in support of petitioner's motion to vacate the *ex parte* wiretap order further stated (RI 9):

> "Section 813(a) of the Code of Criminal Procedure provides in part, that an ex parte order for eavesdropping may issue if 'there is reasonable ground to believe that evidence of crime may be thus obtained.'
>
> "The contention is made here that at the time of the application there was no proof submitted to the Court establishing such reasonable ground."

Respondent, in opposing the separate proceeding to vacate the wiretap order, urged that the proceeding was not maintainable at all by reason of lack of any State procedure for the purpose so that these *ex parte* wiretap orders once made are not thereafter reviewable by any court or judge; and that in any event the supporting affidavits upon which the *ex parte* order was issued were adequate to show reasonable cause under the statute. However, with respect to the latter contention respondent also urged that the supporting affidavits were secret and must be kept secret at all costs, wherefore respondent surrendered those affi-

davits for inspection only by the Court itself, reserving the position that "this submission is not to be deemed an acknowledgment * * * of the propriety of the present motion. It is made solely for the convenience of the Court * * * " etc. (RI 12-13).

In the argument before Justice Arkwright on the motion to vacate the *ex parte* wiretap order petitioner urged, *inter alia, that* "the law of the land," as enunciated by the Supreme Court of the United States for the protection of "the community * * * from frivolous applications for wiretap orders" and for the protection of the "substantial right * * * of every human being, to remain free from this kind of intrusion", and as enunciated also in New York State's own permissive wiretap legislation (Code Crim. Proc. §813-a) and in §605 of the Federal Communications Act (U.S.C. Title 47), required that the Supreme Court of the State of New York exercise "its inherent power to review such an order" (RII 10-13).

Justice Arkwright denied the motion to vacate the *ex parte* wiretap order in a decision dated February 6, 1963 (appendix hereto *infra*, p. 28) upon which an order was filed February 26, 1963 (*id.*, p. 32). Justice Arkwright did not make any determination that the information supplied to the Judge who issued the *ex parte* wiretap order was sufficient. Instead, Justice Arkwright's decision was addressed to the question of whether the showing made by petitioner's affidavit in support of the motion to vacate the wiretap order was sufficient to establish that no sufficient proof had been submitted to the prior Judge. Justice Arkwright's decision contains no indication that he had himself made a judicial evaluation as to the adequacy, in terms of the "reasonable grounds" requirement of §813-a

of the Code of Criminal Procedure, of the showing which had been made in support of the *ex parte* wiretap order. *A fortiori* Justice Arkwright did not, of course, conduct any hearing or trial as to the adequacy of the showing in support of the *ex parte* wiretap order (*id.*, pp. 28-31).

Such hearing or trial was not conducted by Justice Arkwright partly because of his conclusion that the affidavit submitted on behalf of petitioner was not sufficient to negate the sufficiency of the showing in support of the *ex parte* wiretap order, and partly because the need for secrecy (as urged by the District Attorney) in regard to such *ex parte* wiretap application matters, precluded the holding of any such hearing or trial (*ibid.*).

Nevertheless Justice Arkwright recognized that a troublesome issue is presented as to any proposed theory which would altogether preclude judicial reconsideration of such *ex parte* wiretap orders. Thus, Justice Arkwright said: "Although the code, as is conceded, contains no provision for a review of the original order, it is not likely that it will be here argued that on a proper application, a justice could not reconsider or vacate his own order." Then Justice Arkwright went on to state that in situations where the Justice who issued the original *ex parte* order is no longer on the Bench, "a circumstance applicable here, a different problem arises". As to this latter type of situation, Justice Arkwright went on to suggest that "In a hypothetical case" where "perjury" or "error" by an affiant who had made an affidavit in support of the *ex parte* order should be discovered afterwards, "or should some other equally cogent reason present itself, a reconsideration certainly would be proper and necessary in the interests of justice. The authority to review the order in those

cases is inherent in the court". Justice Arkwright, however, concluded that "No such situation has been presented here" (*id.*, pp. 30-31).

On appeal taken to the Supreme Court of New York, Appellate Division, Second Department, by petitioner from Mr. Justice Arkwright's order denying the motion to vacate the *ex parte* wiretap order, respondent moved to dismiss the appeal on the ground that no statutory basis existed in the State of New York for appealability of such an order viewed in either a criminal or civil procedural aspect (RI 37-42). Petitioner, opposing respondent's motion to dismiss the appeal in the Appellate Division, urged that the proceedings in connection with the original granting of the *ex parte* wiretap order itself and the proceedings on the motion before Mr. Justice Arkwright to vacate said wiretap order were independent of the pending criminal indictment proceedings, and that the appeal from Justice Arkwright's order was civil in nature and governed by the State appellate jurisdictional provisions for civil appeals (RI 43-46). On April 17, 1963 the Appellate Division granted respondent's motion to dismiss the appeal, without opinion; an order dismissing the appeal was entered on the same date; service of notice of entry of said order with copy thereof dated April 25, 1963 was accepted by petitioner on May 15, 1963 (RI 47-50; RII 22).*

* We recite these dates, as well as the other specific dates of a similar nature *supra*, for their bearing on the issue of the timeliness of petitioner's procedural steps in the Courts below at each stage. No such issue of timeliness is or can be raised by respondent, but we nevertheless set forth the dates so that this Court may have before it the requisite jurisdictional facts showing that our appeals in the Courts below were not defeated on grounds of failure to perfect the appeals in time. Since no issue as to this is actually (or can be) presented, we refrain from burdening the Court with the State statutory and case law citations relating to this subject.

Petitioner then sought leave to appeal to the Court of Appeals of the State of New York, first by an application to an individual Judge of that Court (Honorable Stanley H. Fuld) on the theory that the matter might be deemed "criminal" in nature within the meaning of §520 N.Y. Code Crim. Proc. (RII-7), this application being denied without opinion by Judge Fuld on July 10, 1963 (appendix hereto, *infra;* p. 25); and secondly and concurrently, Petitioner sought such leave to appeal by an application to the full Court of Appeals pursuant to the Civil Practice Act of New York on the alternative theory that the matter might be deemed "civil" in nature (RII, *passim*), this application likewise being denied on July 10, 1963 by the full Court of Appeals, without opinion (appendix hereto, *infra*, p. 24).

Petitioner's contentions before the Court of Appeals on the legal and constitutional merits of the wiretap issue were set forth in a memorandum of law and an affidavit (RII 3-54). Those contentions were summarized in the affidavit as follows (*id.* 22-25):

> "* * * (1) The *ex parte* wiretap order herein was illegal, whether or not the 'reasonable grounds' requirements of §813-a of the Code of Criminal Procedure were complied with, because all wiretapping is in violation of the Federal Communications Act (47 U.S.C. §605). (2) Even if the aforesaid provision of the Federal Communications Act did not exist, the instant *ex parte* wiretap is unconstitutional under the Fourth and Fourteenth Amendments of the Federal Constitution as an unreasonable search and seizure unless 'probable cause' existed for the issuance of the 'warrant' herein (i.e., the *ex parte* wiretap order) and, indeed, the federal constitutional prohibition against unreasonable searches and sei-

zures would be violated even where such 'probable cause' ostensibly existed because all wiretaps, owing to their intrinsically offensive character and their sheer repellency to principles of civilized government and decent society, are *ipso facto* 'unreasonable' searches and seizures—just as would be any of the other more arrant form of search and seizure which the Constitution unqualifiedly prohibits (irrespective of the presence *vel non* of 'probable cause'), such as searches and seizures accompanied by excessively brutal, violent or otherwise offensive methods for extracting information involuntarily from the citizen. (3) To the extent that the issue of the constitutionality of the instant *ex parte* wiretap order does turn upon the adequacy of the showing of the 'probable cause' or 'reasonable grounds' in support of the obtaining of said wiretap order, the appellant-movant Dr. Cohen was and is entitled to a judicial hearing on the issue of such adequacy, he has had in effect no such hearing whatever, and irrespective of the posture of the statutory remedies presently afforded in this State it is constitutionally incumbent upon the State courts to afford such a hearing under their inherent judicial powers and obligations pursuant to the Supremacy Clause of the Federal Constitution (Article VI) which imposes upon the State judiciary the paramount duty of vindicating the primacy of the Constitution and Laws of the United States—a duty which also devolves upon the State judiciary pursuant to our own State Constitution, and, indeed, pursuant to the very provisions of §813-a of the Code of Criminal Procedure itself. (4) Justice Arkwright erred in not holding such a constitutionally (and statutorily) required hearing on the issues of the reasonableness of the search and seizure of this *ex parte* wiretap order as well as on

the issues of its federal statutory permissibility under §605 of the Federal Communications Act. (5) Irrespective of whether the appeal which Dr. Cohen took to the Appellate Division be viewed as having been taken pursuant to §517 of the Code of Criminal Procedure or pursuant to §§609 to 612 of the Civil Practice Act, the 'constitutional fact' remains that as of the present posture of this proceeding, the appellant-movant Dr. Cohen stands deprived of his federal and state constitutional right to a judicial hearing as to the question of the 'probable cause' or 'reasonable grounds' for the search and seizure to which he was subjected by virtue of the *ex parte* wiretap and in effect has been denied all judicial hearing or judicial test of its constitutional (or statutory) propriety. (6) In these circumstances, it is either constitutionally obligatory upon the Honorable Judge Stanley M. Fuld, acting pursuant to §§519 and 520 of the Code of Criminal Procedure under the application which was presented to him on May 3, 1963, or it is constitutionally obligatory upon this entire Court acting pursuant to §§589 and 592 of the Civil Practice Act under the instant motion for permission to appeal, to grant Dr. Cohen's right of further appeal in this Court so that a proper order may be made remanding this matter with instructions to hold a judicial hearing on the issues of the constitutional and statutory adequacy of the alleged showing of 'probable cause' or 'reasonable grounds' for the issuance of the within *ex parte* telephone wiretap order."

As to how the Federal questions are presented, we respectfully note that in the course of the foregoing Statement of the Case we have recited the ways in which petitioner presented his constitutional contentions in the

Courts below. As seen, petitioner formulated the Federal constitutional issues with particular explicitness before the Court of Appeals. That Court, by denying leave to appeal must be deemed to have decided that Justice Arkwright's determination should stand undisturbed notwithstanding the Federal constitutional objections which petitioner urged against that determination both before Justice Arkwright and in the Court of Appeals.

Because of the peculiar way in which the issue of appealability in the two appellate Courts below became interwoven in this case with the issues of substantive constitutional right which petitioner had claimed in the Court of first instance (before Mr. Justice Arkwright), and as to which rights he unavailingly sought appellate vindication to relieve him of the consequences of Justice Arkwright's having cut him off from those rights without any meaningful judicial hearing whatever, this case comes before this Court in a perhaps uncertain jurisdictional posture as respects the question of whether the "final judgment" here to be reviewed is the order (or orders) of the Court of Appeals (and of Judge Fuld) denying leave to appeal or the order of Justice Arkwright denying the motion to vacate the *ex parte* wiretap and to obtain a hearing. It is this possible uncertainty which has prompted us to structure this petition for certiorari as seeking review, alternatively, of one or the other of the two (or three) last-mentioned orders below.

There is no uncertainty, however, we submit, that the Federal questions are properly presented, whichever of the latter orders be deemed the "final judgment" herein—and we argue under the "Reasons for Granting the Writ"

infra, that these properly presented Federal questions are substantial ones..

We note also that, if the "final judgment" be deemed to be Justice Arkwright's order, the time for filing our petition for certiorari "runs from the date of the higher Court's refusal to review" (Stern and Gressman, *Supreme Court Practice*, (3rd Ed.), p. 88).

As regards the question earlier mentioned of whether the presently continuing pendency of our separate State court motion-to-suppress proceeding may portend the existence of another adequate State remedy for disposition of our wiretap contentions, it seems to us that the only proper representation which we can make to this Court consists of an adequate recital of the pertinent facts concerning said motion-to-suppress proceeding in relation to the instant proceeding, and that is what we are trying to do herein. It does also seem to us, however, that, until Justice Rinaldi renders his decision in the motion-to-suppress proceeding, it cannot be known whether "another adequate State remedy" will emerge therefrom. Justice Rinaldi's determination may range all the way from a ruling that *ex parte* wiretap orders in New York State are not judicially reviewable at all in that State's courts, to a ruling that the *ex parte* wiretap order here involved is invalid and shall be vacated. A ruling in the former category, or in some variation thereof which cannot now be foretold, would point to the conclusion that there is no "other adequate State remedy"; a ruling of the latter category would, of course, render this certiorari proceeding moot in the most total sense. This Court may, therefore, wish to await the outcome of the motion-to-suppress

proceeding before finally disposing of the instant petition for certiorari.

The question of State Court appealability of Justice Rinaldi's forthcoming decision is, to be sure, still another matter, and one about which nothing very helpful can be said at the present juncture. We may say, however, that if we lose before Justice Rinaldi on a Federal ground and find ourselves definitively precluded from State court appellate review except by awaiting ultimate appeal from a conviction under the indictments, we shall expect to consider coming back to this Court either *via* a new and separate petition for certiorari or *via* an amended or supplemental petition aimed at combining the motion-to-suppress matter with the subject matter of the instant petition for certiorari. We mention this possibility at this time as an additional consideration which this Court may wish to take into account in deciding whether to defer a final disposition of the instant petition for certiorari until after Justice Rinaldi decides the pending motion-to-suppress proceeding.

The peculiarly interwoven character of this proceeding on petition for certiorari and the pending motion-to-suppress proceeding before Justice Rinaldi, makes it pertinent also for us to submit to this Court at this time one additional item of information about the facts which have been developed in the evidentiary hearing in the latter proceeding:— Although Justice Rinaldi did not permit us to see the affidavits which were tendered by respondent in support of the application for the *ex parte* wiretap order, the evidence taken at the hearing before Justice Rinaldi did disclose, to some extent, what the essential basis of those affidavits was; Justice Rinaldi himself knows the con-

tents of those affidavits and his forthcoming decision may or may not explicitly reflect that knowledge. The indications from the evidence admitted by Justice Rinaldi are that the sole basis for the wiretap affidavits was an allegation of one past-committed abortion, and this allegation came from informants whose "reliability" had not been ascertained or evaluated in regard to any prior abortion information but only in regard to a batch of wholly unrelated criminal matters (burglary, arson, forgery etc.) in which the informants were personally enmeshed to so hopeless a degree as to make it easy for the police to extract the desired "cooperation" as the price of giving the informants a chance for self-preservation, the instant petitioner being in no way involved in those other criminal matters. Furthermore, we have taken the position before Justice Rinaldi that even if the informants were "reliable" within the meaning of the standards laid down by this Court, an allegation of a single past-committed abortion cannot constitutionally justify a wiretap "search" because in its very nature such could be nothing more than an unconstitutional search for "mere evidence" as distinct from "fruits" or "instrumentalities" of crime.

Reasons for Granting the Writ

1. This case illustrates the all-but grotesque sort of situation that can come about in a State which, like New York, still finds it unthinkable to give up police wiretapping notwithstanding decisions such as *Benanti* v. *United States*, 355 U.S. 96, and *Mapp* v. *Ohio*, 367 U.S. 643; cf. also the concurring and dissenting opinions in *Lopez* v. *United States*, 373 U.S. 427.

We shall indicate in a moment exactly why we ventured just now to characterize the situation in this case as bordering upon the grotesque, but first a few further words are in order concerning the status of the decisional law in this Court and in New York which relates to this situation:

The 4 to 3 decision of the New York Court of Appeals in *People* v. *Dinan*, 11 N.Y. 2d 350, cert. denied 371 U.S. 877, holding that neither §605 nor the *Mapp* case require the exclusion of illegal wiretap evidence from State criminal trials, plays to the hilt this Court's decisions in *Pugach* v. *Dollinger*, 365 U.S. 458 and *Schwartz* v. *Texas*, 344 U.S. 199. The supposed constitutionally ordained Supremacy of Federal statute law and of Federal Fourth Amendment law*. continues to be set at nought in New York State wiretapping cases.

When we said above that the situation in our particular case is all but grotesque, we meant that the doctrine has apparently been given effect in this case that the rule of unlimited admissibility of wiretap evidence in New York criminal trials is so absolutely unqualified as to result in a companion rule of likewise absolute non-justiciability of claims of illegal wiretapping. Is it conceivable that this Court in the *Schwartz* and *Pugach* cases, *supra*, intended to

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* We do not think it is hazardous to guess, from the tenor of this Court's recent decisions on electronic eavesdropping, that if §605 of the Communications Act did not exist, the Fourth Amendment would by now have come into its own in this area of "searches". See, in addition to the *Benanti* and *Mapp* cases, *Silverman* v. *United States*, 365 U.S. 505; *Elkins* v. *United States*, 364 U.S. 206; *Chapman* v. *United States*, 365 U.S. 610; the above cited concurring and dissenting opinions in *Lopez*; and Judge's Clark's dissent in *Pugach* v. *Dollinger*, 277 F. 2d 739, 747 et seq. (C.A. 2 1960), affirmed 365 U.S. 458.

countenance the erection of this kind of closed system within which State wiretap lawlessness can safely defy challenge from any and every judicial quarter? Decisions like the instant one nullify even the very recent amendatory policy pronouncements of the State Legislature itself in its remedial efforts to pay at least some attention to what this Court has been saying in cases like *Mapp* and *Benanti*. If an *ex parte* wiretap order under New York's permissive Code Crim. Proc. §813-a is absolutely and forever non-reviewable in any Court and by any mode of proceeding, then what becomes of the supposedly protective features of the latter statute itself (quoted in appendix hereto *infra*, p. 35), and what becomes of the several supposedly notable statutory changes just mentioned which were adopted in 1962 by the New York State Legislature in an explicit effort to show constitutional respect for *Mapp* and *Benanti* (see N.Y. C.P.L.R. §4506, formerly N.Y.C.P.A. §345-a, with which see the Governor's statement of approval in McKinney's 1962 Session Laws of New York, p. 3677; see also N.Y. Code Crim. Proc. §§813-c to 813-e, and the Governor's memorandum in McKinney's *op. cit.*, pp. 3673-3674; and see also the revised §§791 et seq., N.Y. Code Crim. Proc., and the Governor's memorandum in McKinney's, *op. cit.*, p. 3636)? We emphasize these nullificatory impingements of the instant decision upon the State's own recently declared legislative policy changes, not, of course, because we expect this Court to monitor the State courts' interpretation of their own State's laws, but because we think that this emphasis reveals in all its starkness the intolerable condition of constitutional turmoil and constitutional frustration which persists in New York wiretapping cases despite even the earnest efforts of the State Legislature itself to "do some-

thing'' about the problem. The lesson, we need hardly say, is obvious: there now exists no other recourse except to pray this Court to ''do something'' about it.

2. Whether this case is presently ripe for this Court's intercession remains questionable, we readily admit, and indeed that is why we dwelt *supra* at such length on the problems of the relationship between the proceedings below in the instant case and the parallel proceedings in the motion-to-suppress matter now pending before Justice Rinaldi. The jurisdictional time requirements of the certiorari procedure in this Court have obliged us to make the instant presentation to this Court at this time. We respectfully request the Court to utilize its general appellate powers and, specifically, its powers to administer its own docket, in such manner as to keep the instant proceeding jurisdictionally alive until after the disposition of our aforesaid pending matter before Justice Rinaldi, if this Court should deem it necessary to take such action in order to ensure a proper ultimate disposition of the instant petition for certiorari.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted; and that the petition should not be disposed of adversely to petitioner without consideration of what may transpire upon the rendering of the forthcoming decision of Justice Rinaldi of the Supreme Court of New York, Kings County, in our pending motion there to suppress evidence.

Respectfully submitted,

WILLIAM W. KLEINMAN and
EUGENE GOLD,
Attorneys for Petitioner.

[APPENDICES FOLLOW]

APPENDIX A

Opinion and Judgments Below

1. Order of Court of Appeals of the State of New York Denying Permission to Appeal

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Tenth day of July A. D. 1963.

Present:

HON. CHARLES S. DESMOND,
Chief Judge, presiding.

---

2 Mo. No. 434

THE PEOPLE &c.,
Respondent,

vs.

CARL I. COHEN,
Appellant.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

A copy

RAYMOND J. CANNON
Clerk

(SEAL)

Appendix A

2. Order of Honorable Stanley M. Fuld, Judge of the Court of Appeals of the State of New York, Denying Permission to Appeal

STATE OF NEW YORK
COURT OF APPEALS

Before:

HON. STANLEY H. FULD,

Associate Judge.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

CARL I. COHEN,

Appellant.

CERTIFICATE DENYING LEAVE

I, STANLEY H. FULD Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above named appellant for a certificate pursuant to §520 of the Code of Criminal Procedure, and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York
July 10, 1963.

STANLEY H. FULD
Associate Judge

3. Order of Appellate Division Granting Motion to Dismiss Appeal

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 17th day of April, 1963.

Present:

HON. GEORGE J. BELDOCK,

Presiding Justice.

" MARCUS G. CHRIST,
" ARTHUR D. BRENNAN,
" L. BARRON HILL,
" SAMUEL RABIN,

Justices.

THE PEOPLE OF THE STATE OF NEW YORK

Respondent

—v.—

CARL I. COHEN

Appellant

ORDER ON MOTION TO DISMISS APPEAL

The above named Carl I. Cohen, defendant in this action having appealed to the Appellate Division of the Supreme Court from an order of the Supreme Court entered in the

office of the Clerk of the County of Kings on February 26, 1963 denying appellant's motion to vacate a prior ex parte order authorizing the interception of telephone communications and the respondent having moved to dismiss said appeal herein, by a notice of motion, dated the 27th day of March, 1963

Now on reading and filing the affidavit of William I. Siegel in support of said motion and the affidavit of Eugene Gold in opposition thereto; and the said motion having been submitted by Mr. William I. Siegel, Asst. Dist. Atty. of Counsel for the respondent and submitted by Mr. Eugene Gold of Counsel for the appellant and due deliberation having been had thereon:

It is Ordered that the said motion be and the same hereby is granted, appeal dismissed.

Enter

JOHN J. CALLAHAN

4. Memorandum Decision of Appellate Division

(New York Law Journal—April 18, 1963)

By BELDOCK, *P.J.*; CHRIST, BRENNAN, HILL and RABIN, *JJ.*

Motion by respondent to dismiss appeal from order, entered February 26, 1963, denying appellant's motion to vacate a prior ex parte order authorizing the interception of telephone communications. Motion granted; appeal dismissed.

Appendix A

5. Memorandum Decision of Supreme Court of the State of New York, Kings County, Arkwright, J., Denying Motion to Vacate *Ex Parte* Wiretap Order

SUPREME COURT

KINGS COUNTY

(SPECIAL TERM—PART X)

THE PEOPLE OF THE STATE OF NEW YORK

—v.—

CARL I. COHEN

By ARKWRIGHT, *J.*

February 6, 1963

Defendant moves for an order vacating and setting aside an order of this court dated July 28, 1960, which order authorized the interception of telephone communications upon a certain telephone number listed under the name of the defendant, Carl I. Cohen, for the apparent purpose of obtaining information concerning defendant's activities in relation to the crime of abortion; and for a further order directing a hearing to determine whether there was compliance with the mandates of Section 813(a) of the Code of Criminal Procedure of the State of New York.

Section 813(a) of the Code of Criminal Procedure provides, in part, that

> "an ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred

> thirty-eight of the penal law may be issued by any justice of the supreme court * * * upon oath or affirmation of a district attorney, or of the attorney-general or an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overhead [sic] or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. * * * "

The only supporting affidavit on the instant application is that of the attorney for the defendant. He and his client admittedly have no knowledge of what was contained in the affidavits submitted on the original application but argue that on defendant's arraignment in the Felony Court, where he was charged with the crime of abortion, the District Attorney stated that the defendant has been under surveillance for a substantial period of time and that many women had been interviewed, each of whom denied having been aborted, and that the conclusion is inescapable that the failure of the District Attorney through investigation to obtain evidence against the defendant could not support the ex parte order which authorized the wire tap.

With this conclusion, I do not agree as it is quite apparent that the information supplied the court and upon which the

court acted may not have been limited to the knowledge of the women above referred to.

Based, however, upon the above reasoning, the defendant seeks a hearing to determine whether the information submitted to the court was legally sufficient to support the said ex parte order.

The essence of the application is that no sufficient proof was submitted to the court establishing reasonable ground for believing that evidence of the crime might be obtained pursuant to the said statute and that the order was improperly issued.

It must be clear that orders under Section 813(a) of the Code of Criminal Procedure and the supporting affidavits thereof must be surrounded with such secrecy as is necessary to effectuate the intent of the statute. Were it otherwise the statute would be useless. In the application, the judge issuing the order is vested by said statute with the authority to examine on oath the applicant and the witnesses he may produce, if he so desires, to satisfy himself of the existence of reasonable grounds for the granting of such application. It must be presumed that in issuing the order the issuing justice exercised sound discretion and that the order was issued upon the sufficient proof required.

Although the Code, as is conceded, contains no provision for a review of the original order, it is not likely that it will be here argued that on a proper application, a justice could not reconsider or vacate his own order. In a situation where a justice has been retired for age, has resigned or is deceased, a circumstance applicable here, a different problem arises. In a hypothetical case, should it be discovered that

perjury had been committed in the affidavits supporting the original application; or should an affiant since making an affidavit discover that he had been in error; or should some other equally cogent reason present itself, a reconsideration certainly would be proper and necessary in the interests of justice. The authority to review the order in those cases is inherent in the court. No such situation has been presented here.

The application is denied in toto.

G. A. A.
J. S. C.

Filed: Feb. 8, 1963.

Appendix A

6. Order Appealed From Denying Defendant's Motion to Vacate and Set Aside *Ex Parte* Order, etc.

At a Criminal Term, Part I of the Supreme Court of the State of New York held in and for the County of Kings on the 26 day of February 1963.

Present:

HON. GEORGE A. ARKWRIGHT

Justice

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

—against—

CARL I. COHEN,

Defendant.

The following papers read and proceedings had on this motion:

1. The Notice of Motion and Petition dated January 24, 1963;

2. • • •

3. • • •

4. • • •

5. The answering affidavit of William I. Siegel sworn to the 29th day of January, 1963

6. • • •

7. • • •

And the District Attorney opposing the motion;

Now, on filing the decision of the Court dated February 6, 1963, denying the motion;

Upon the foregoing papers and proceedings, and after due deliberation, it is

ORDERED, that the motion for an order vacating and setting aside an order of this court authorizing interception of telephone communications be and the same hereby is denied.

GEORGE A. ARKWRIGHT
Justice of the Supreme Court

APPENDIX B

Statutes Involved

1. 47 U.S.C. §605

§ 605. UNAUTHORIZED PUBLICATION OR USE OF COMMUNICATIONS

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the

existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: * * *

2. N.Y. Code Crim. Proc. §813-a (McKinney's)

§ 813-a. Ex parte order for eavesdropping

An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overhead[1] or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is

[1] So in original. Probably should be "overheard".

in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same. As amended L.1958, c. 676, eff. July 1, 1958.

L.1958, c. 676, eff. July 1, 1958, among other changes, in catchline substituted "eavesdropping" for "interception, overhearing or recording"; in sentence beginning "An ex parte order" substituted "eavesdropping as defined * * * the penal law" for "the interception * * * telephonic communications" preceding "may be issued by" and added "and, in the case of * * * telegraph line involved"; in second sentence beginning "Any such order," substituted "the eavesdropping authorized therein" for "intercepting, overhearing * * * instruments described", and in sentence beginning "A true copy" added "and, in the event * * * justice denying the same."

3. N.Y. Code Crim. Proc. §§813-c to 813-e (McKinney's)

TITLE II-B

OF MOTIONS FOR RETURN OF PROPERTY OR FOR THE SUPPRESSION OF EVIDENCE ALLEGED TO HAVE BEEN OBTAINED AS A RESULT OF UNLAWFUL SEARCH AND SEIZURE [NEW]

Sec.

813-c. The motion in general.
813-d. Time of making and determination.
813-e. In what courts made.

Title added by L. 1962, c. 954, §1, eff. April 29, 1962.

§813-c. The Motion in General

A person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the property, papers or things, hereinafter referred to as property, claimed to have been unlawfully obtained may be used as evidence against him in a criminal proceeding, may move for the return of such property or for the suppression of its use as evidence. The court shall hear evidence upon any issue of fact necessary to determination of the motion.

If the motion is granted, the property shall be restored unless otherwise subject to lawful detention, and in any event it shall not be admissible in evidence in any criminal proceeding against the moving party.

If the motion is denied, the order denying such may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Added L. 1962, c. 954, §1, eff. April 29, 1962.

§813-d. Time of Making and Determination

The motion shall be made with reasonable diligence prior to the commencement of any trial in which the property claimed to have been unlawfully obtained is proposed to be offered as evidence, except that the court shall entertain a motion made for the first time during trial upon a showing that (1) the defendant was unaware of the seizure of

the property until after the commencement of the trial, or (2) the defendant, though aware of the seizure prior to trial, has, only after the commencement of the trial, obtained material evidence indicating unlawful acquisition, or (3) the defendant has not had adequate time or opportunity to make the motion before trial.

If a motion has been made and denied before trial, the determination shall be bindng upon the trial court, except that, if it is established that, after the making of such motion, the defendant obtained additional, material evidence of unlawfulness which could not have been obtained with reasonable diligence before the making of the motion, the court shall entertain another motion, or a renewal of a motion, during the trial.

When the motion s made before trial, the trial shall not be commenced until the motion has been determined. When the motion is made during trial, the court shall, in the absence of the jury, if there be one, hear evidence in the same manner as if the motion had been made prior to trial, and shall decide all issues of fact and law.

If no motion is made in accordance with the provisions of this title, the defendant shall be deemed to have waived any objection during trial to the admission of evidence based on the ground that such evidence was unlawfully obtained. Added L. 1962, c. 954, §1, eff. April 29, 1962.

§ 813-e. In what courts made

When an indictment, information or complaint upon which the defendant may be tried for a crime or offense has been filed in a court, or after the defendant has been held

by a magistrate to answer a charge in another court, the motion shall be made in the court having trial jurisdiction of such indictment, information, complaint or charge.

Before any indictment, information or complaint upon which the moving party may be tried for a crime or offense has been filed in a court, and before the moving party has been held by a magistrate to answer a charge in another court, the motion shall be made, if in a county outside of the city of New York, in the supreme court or the county court. In the city of New York, the motion, if made prior to September first, nineteen hundred sixty-two, shall be made in a county court or the court of general sessions of the county of New York as the case may be, and, if made on or after September first, nineteen hundred sixty-two, in the supreme court.

If the motion is made in one of such courts before such an indictment, information or complaint is filed, or before a magistrate has held the defendant to answer, and if, before determination of the motion, an indictment, information or complaint is filed in a different court, or the moving party is held by a magistrate to answer in a different court, the court before which the motion has been made shall not determine the motion but shall refer it to the court of trial jurisdiction. If, however, the motion has been determined at the time of the filing of the charge in the different court or at the time of the holding by the magistrate to answer in a different court, such determination shall be binding upon the court of trial jurisdiction, except that another motion may be made during trial pursuant to the provisions of section eight hundred thirteen-d. Added L.1962, c. 954, § 1, April 29, 1962.

Appendix B

4. N.Y. C.P.L.R. §4506 (McKinney's) (former N.Y. C.P.A. §345a)

§ 4506. Eavesdropping evidence

Evidence obtained by any act of eavesdropping, in violation of section seven hundred thirty-eight of the penal law, or by any act in violation of section eight hundred thirteen-b of the code of criminal procedure, or by eavesdropping without court order, as permitted by said section of the code of criminal procedure, when an application for such order is thereafter made as required by said section but is denied, and evidence obtained through or resulting from information obtained by any such act, shall be inadmissible for any purpose in any civil or criminal action, proceeding or hearing; provided, however, that any such evidence shall be admissible in any civil or criminal action, proceeding or hearing against the person who has, or is alleged to have, violated section seven hundred thirty-eight of the penal law or section eight hundred thirteen-b of the code of criminal procedure. As amended L.1962, c. 318, § 20.

Amendments

L.1962, c. 318, § 20, eff. Sept. 1, 1963, among other changes, included criminal actions and inserted proviso clause.

Source of Section

C.P.A.1920, § 345-a added L.1957, c. 880.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1963

No. 640

CARL I. COHEN,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWARD S. SILVER
District Attorney
Kings County

WILLIAM I. SIEGEL
Assistant District Attorney
Of Counsel.

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IN THE

Supreme Court of the United States

October Term 1963

No.

CARL I. COHEN,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents,

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Petitioner seeks a writ of certiorari in order to review an order of the Supreme Court of the State of New York, Kings County; or in the event that jurisdiction will not lie to review this order, for a review of orders of the Court of Appeals of the State of New York and of a single Judge (Fuld, J.) of that Court, hereinafter more fully described.

Previous Proceedings

Petitioner at all times hereinafter concerned rested under five indictments found by the Grand Jury of Kings County in 1960. Each charged him with the commission of the crime

of Abortion. In the course of judicial proceedings respecting these indictments he for the first time learned,—quite accidentally,—that on or about July 28, 1960 an order had been made by Honorable J. Vincent Keogh, then a Justice of the Supreme Court, pursuant to the provisions of the Code of Criminal Procedure, Section 813-a, which authorized the interception of telephone communications being transferred over a telephone located in petitioner's office in Brooklyn and registered on the records of the New York Telephone Company in his name. His knowledge of the existence of this order came solely through a voluntary disclosure of its making by a representative of the District Attorney of Kings County during judicial argument. The disclosure was not only voluntarily made; indeed, it may well have been unnecessary to the purposes of the judicial proceedings then in progress. Certainly it is correct to say that petitioner's awareness of the existence of the order was entirely fortuitous.

Petitioner then moved in the Supreme Court for two-fold relief. One form was for an order granting a hearing to determine whether or not the telephone interception order of July 28, 1960 had been issued after due compliance with the requirements of Code Crim. Pro. Section 813-a. The other type was for the vacature of the authorizing order itself. After due argument* before Honorable George A. Arkwright, a Justice of the Supreme Court, the motion was denied with an opinion on February 1, 1963 (petitioner's appendix, p. 28) which was thereafter implemented by the order of February 26, 1963 (Petitioner's Appendix A, p. 32), which is the subject of the present petition.

---

* Petitioner does not include in the Appendix to his brief the minutes of argument upon the basis of which the motion was denied. We therefore annex them as Appendix A to our brief.

Petitioner appealed from the order. On April 17, 1963 the Appellate Division of the Supreme Court, Second Judicial Department, unanimously granted the People's motion to dismiss the appeal. No opinion was written.

Petitioner then took action of two-fold nature. Upon the assumption that the order was made in a criminal action and that an appeal therefrom lay only by permission granted by a Judge of the Court of Appeals or a Justice of the Appellate Division pursuant to Code Crim. Pro. Section 520, an application was made to Judge Fuld of the Court of Appeals for such leave to appeal. It was denied by him on July 10, 1963. Petitioner had simultaneously moved in the Court of Appeals for leave to appeal from the Appellate Division order of April 17, 1963. That Court denied leave to appeal on the same day, July 10, 1963. Neither Judge Fuld nor the Court of Appeals itself wrote an opinion.

The instant petition for the writ of certiorari follows.

Jurisdiction

Jurisdiction for the present petition is sought to be invoked under 28 U.S.C. Section 1257(3). It is contended that petitioner's rights, privileges and immunities under the Fourth Amendment (unreasonable search and seizure), the Fifth Amendment (self-incrimination) and the Fourteenth Amendment (due process of law) of the Federal Constitution and under 47 U.S.C. Section 605, were violated. It is, in amplification of this contention, asserted that New York's Code of Criminal Procedure, Section 813-a is repugnant to these amendments and to this statute (in the latter case be-

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cause of the supremacy clause contained in Article 6 of the Federal Constitution).

It is our answer that no Federal question, constitutional or otherwise, exists. That is to say, New York as a sovereign State is constitutionally empowered to enact the statute which permits the tapping of private telephones and the full utilization of information procured by such interception. Certainly where, as in the case at bar, no disclosure of the contents of the intercepted message has been made in judicial proceedings, New York's right to utilize the information thus procured *aliunde* is unquestionable.

Clarification of the Issues Presented by the Petition

Throughout his petition reference is constantly made to another proceeding now pending, and undetermined, in the Supreme Court, Kings County. This is (1) a motion to suppress evidence claimed to have been seized during an illegal search of petitioner's office, and (2) to suppress evidence procured through the wiretap order heretofore discussed.

Petitioner asserts, and we do not dispute, that the search of his office was made without the issuance of a warrant. (It was in the course of the proceedings on this first-mentioned motion to suppress that petitioner learned of the existence of the wiretap order of July 28, 1960.)

It is, however, our submission that the issues presented by the pending motion to suppress evidence seized during an allegedly illegal search of premises is completely different from the litigation to which the present petition refers. That there may have been that type of search of premises

prohibited by the Fourth Amendment (which we by no means concede) is entirely irrelevant upon the question of whether or not Code Crim. Pro. Section 813-a violates any constitutional prohibition when it permits the judicial issuance of an order authorizing telephone interception. We shall, we are confident, establish the constitutionality of Section 813-a. It therefore follows axiomatically that if that statute is constitutional any other action taken by the police and/or the District Attorney not under its aegis, even if it were violative of the Fourth Amendment, would in no way affect the merits or propriety of the telephone interception made pursuant to Section 813-a.

We come, therefore, directly to the question of the constitutionality of that statute.

POINT I

Code of Criminal Procedure, Section 813-a offends no provision of the federal constitution.

For the convenience of the Court we set forth the statute *in extenso.*

> "Section 813-a. Ex parte order for eavesdropping.
>
> An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evi-

dence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same."

The safeguards against indiscriminate exercise of the statute are notable. The applicant must be either the District Attorney or the Attorney General of the State or a police official of responsible rank. The application for the order must be based upon a showing of reasonable ground for the belief that evidence of crime may be obtained by the wiretap. The identity of the persons involved must be de-

scribed. The Justice or Judge to whom the application is made has power to examine under oath as to these matters and he must be judicially satisfied "of the existence of reasonable grounds for the granting of such application."

One notes immediately the resemblance existing between these requirements and those which safeguard the rights of citizens in respect to the issuance of search warrants. Code of Criminal Procedure, Section 793 provides that:

> "A search warrant cannot be issued, but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property, and the place to be searched."

Section 794 of the Code requires that:

> "The Magistrate must, before issuing the warrant, examine, on oath, the complainant and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them."

Then, and only then, may he issue the search warrant.

The statute was enacted pursuant to the provisions of New York Constitution, Article 1, Section 12:

> "The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof."

We are confident that the statute may not be successfully attacked upon any claim that New York's Legislature was careless and improvident in the exercise of its authority. Only a conclusive showing of repugnance to a Federal Constitutional prohibition can avail petitioner. We shall demonstrate that the statute does not thus offend.

In 1949 an action was brought in the United States District Court for the Southern District of New York for a declaratory judgment that both the statutory and constitutional provisions above quoted, and all orders made by judicial officers of the State of New York pursuant thereto and all interceptions and divulgences made thereunder, were in violation of 47 U.S.C.A. Section 605. The complaint also sought an injunction against the future issuance of orders by New York Judges. *Hoffman, et al.* v. *O'Brien, Police Commissioner of the City of New York, et al.*, 88 F.S. 490. The case was decided by a Bench comprised of Learned Hand, C.J. and Conger and Ryan, D.J.J. The complaint was dismissed for lack of jurisdiction. This Court, upon a direct appeal from the judgment of the District Court, affirmed, 339 U.S. 955, 70 S. Ct. 982, 94 L. ed. 1367.

The District Court dismissed the complaint for the two-fold reason that no constitutional question was properly raised by the complaint and that the plaintiffs had "* * * no greater interest in the matter than any other citizens; they do not allege that they have been singled out, or are likely to be." It is, however, important to note the language used by Ryan, D.J. in the course of his opinion for the Court:

> "With the restrictions placed around the granting of orders of interceptions, it appears that even if

> plaintiffs' telephonic and telegraphic communications have, in fact, been intercepted and divulged, this was occasioned either by the fact that plaintiffs were using a telephone line concerning which there had been a judicial finding (ex parte, it is true, but based on sworn proof) that there was probable cause to believe that it was being used as an instrument of crime in the commission of crime, or that plaintiffs were in communication with an individual of whom such finding had been made. It is the alleged invasion of plaintiffs' civil rights pertaining to the privacy and secrecy of communications of this character which constitutes the sole ground alleged for jurisdiction of this court."

We concede, of course, that the rulings of the District Court and of this Court rest upon procedural grounds. It is, however, our submission that implicit in the case is a finding that neither the New York constitutional nor statutory provision offends the Federal Constitution. If either the District Court or this Court had felt otherwise, then in the case of the District Court the language which we have quoted would not have been used and, in the case of this Court, the reason for the affirmance would have been more explicitly stated.

We now proceed on the basis of the decisions of this and other Courts concerned with telephone wiretapping and interception.

The Court for the first time considered the question in *Olmstead* v. *United States*, 277 U.S. 438. The Court held that although the State of Washington prohibited telephone wiretapping, evidence procured in this manner by agents of the United States was nevertheless admissible against de-

fendants in a Federal prosecution for conspiracy to violate the National Prohibition Act. The specific holding of the Court was that such evidence was not repugnant to either the Fourth Amendment prohibiting unreasonable searches and seizures or the Fifth Amendment prohibiting compulsory self-incrimination.

It is true that Holmes, Brandeis, Butler and Stone, J.J. dissented in separate opinions. However, it cannot be questioned that evidence procured through telephone wiretapping remained constitutionally admissible in Federal Court prosecutions until the enactment by Congress of 47 U.S.C. Section 605 (Federal Communications Act).

The Court made it clear in the two *Nardone* cases (*Nardone* v. *United States*, 302 U.S. 379; *Nardone* v. *United States*, 308 U.S. 338), that the exclusionary effect of Section 605 was applied in Federal prosecutions to Federal agents, but that the rule of exclusion arose solely through the operation of the statute.

It is also indisputable that this Court as late as *Schwartz* v. *Texas*, 344 U.S. 199, 97 L. ed. 231, 73 S. Ct. 232, refused to impose Section 605 upon the several States. Minton, J. wrote for a Court in which only Douglas, J. dissented:

> "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested (citing).
>
> It is due consideration but not controlling that Texas has legislated in this field. Our decision would be the same if the Texas courts had pronounced this rule of evidence.

> We hold that Section 605 applies only to the exclusion in federal court proceedings of evidence obtained and sought to be divulged in violation thereof; it does not exclude such evidence in state court proceedings. Since we do not believe that Congress intended to impose a rule of evidence on the state courts, we do not decide whether it has the power to do so."

Petitioner argues that the force of this clear and precise decision has been minimized, if not completely destroyed, by *Benanti* v. *United States*, 355 U.S. 96. This is, however, only wishful thinking.

In *Benanti*, the Court explicitly refused to rule upon the contention that evidence, obtained as the result of wiretapping by State law enforcement officers without participation by Federal authorities, was barred by the Federal Constitution as well as by Section 605 from reception in a Federal prosecution:

> "We do not reach the constitutional questions as this case can be determined under the statute."

The Court did hold that the evidence was rendered inadmissible in the Federal Court by the statute when obtained by either State or Federal agents through wiretapping.

True, the Court also said that Congress was constitutionally empowered to make Section 605 applicable to State agents, even where the State itself authorizes wiretapping "in the exercise of its legitimate police functions". ("It is undisputed that an order pursuant to that law was issued in this case and that it was executed according to State law".)

True it is, also, that the Court held that Congress had intended to prohibit wiretapping even under the aegis of State legislation:

> "In light of the above considerations, and keeping in mind this comprehensive scheme of interstate regulation and the public policy underlying Section 605 as part of that scheme, we find that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy."

Petitioner, however, cannot take comfort in the last quoted language of the Court; nor can he correctly find in it a ruling that *Benanti* overruled *Schwartz* and that by implication, if in no other way, *Benanti* makes wiretap evidence inadmissible in a State prosecution (and derivatively renders unconstitutional a State statute authorizing wiretapping). This is the only possible construction of the Court's own foot-note No. 19 in *Benanti*:

> "Schwartz v. Texas, 344 U.S. 199, 97 L. ed. 231, 73 S. Ct. 232, supra, is not to the contrary. While it refused to overturn a state rule of evidence, the Court was satisfied that the action of the state officials nonetheless violated Section 605. 344 U.S. at 202."

In sum, the furthest reach of *Benanti* is that it recognizes the criminality under Section 605 of wiretapping *and* divulgence by a State officer, even though his acts have been done pursuant to a State Court order. It does not, however, affect the admissibility of the evidence thus procured in the courts of those states which choose to receive it.

Certainly this has been the construction of *Benanti* by New York's Court of Appeals. In *People v. Dinan*, 11 N.Y. 2d 350, Van Voorhis, J. wrote:

> "In affirming the judgments of conviction of these defendants on gambling indictments, we consider that the intercepted telephone conversations on which these convictions depend are not rendered inadmissible by recent Federal decisions."

In reviewing the course of Supreme Court decisions and Congressional legislation respecting wiretapping, Van Voorhis, J. wrote further:

> "In many criminal prosecutions evidence obtained by wire tapping authorized by orders granted under the New York State Constitution (art. I, Section 12) and Code of Criminal Procedure (Section 813-a) has been introduced in criminal trials in New York State Courts. In 1928 the United States Supreme Court held that the tapping of telephone wires is not in violation of the Fourth Amendment protecting against unreasonable searches and seizures (Olmstead v. United States, 277 U.S. 438, 465). In the opinion it was said: 'Congress may of course protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evidence. But the courts may not adopt such a policy by attributing an enlarged and unusual meaning to the Fourth Amendment.'
>
> Six years later, in June, 1934, section 605 of the Federal Communications Act was enacted in response to this suggestion. Section 605 was held to render wiretap evidence inadmissible in the Federal courts in

Nardone v. United States (302 U.S. 379) but to permit their introduction into evidence in trials in State courts (Schwartz v. Texas, 344 U.S. 199). That was the condition of the law when the United States Supreme Court was called upon in 1957 to decide Benanti v. United States (355 U.S. 96) which reaffirmed the doctrines enunciated in both Nardone v. United States and Schwartz v. Texas. The opinion in Benanti, by Chief Judge Warren (p. 101), says concerning Schwartz: 'The rationale of that case is that despite the plain prohibition of Section 605 (Federal Communications Act), due regard to federal-state relations precluded the conclusion that Congress intended to thwart a state rule of evidence in the absence of a clear indication to that effect.' The Schwartz case was a wire-tapping case. The Supreme Court indicated in it that section 605 of the Federal Communications Act is violated by the procedure for obtaining wire taps prescribed by the New York Constitution and statutes, but made clear that such violations of this Federal statute are not sufficient to justify preventing the States from receiving such evidence in trials in State courts. The Federal statute itself contains no language forbidding the admission of such evidence in any courts. Benanti, Nardone and Schwartz held the means of obtaining such evidence to be illegal, but ruled that it was a question of policy of the forum whether the enforcement of section 605 of the Federal Communications Act should be implemented by imposing an exclusionary rule. Wire taps, it should be repeated, do not infringe constitutional immunity against unreasonable searches and seizures (Olmstead v. United States, supra). Exclusion of such testimony was ordained in the United States courts as a policy measure to aid in the enforcement of section 605. A contrary policy has been adopted in New York State (People v. Variano, 5

N.Y. 2d 391; People v. Dinan, 7 A D 2d 119, 6 N.Y. 2d 715), pursuant to the power reserved in the States by Schwartz v. Texas (supra)."

Petitioner attempts to argue that *Dinan* can no longer be considered good law because of this Court's decision in *Mapp* v. *Ohio*, 367 U.S. 643. In so doing he merely repeats the argument which the Court of Appeals there rejected in the language of Van Voorhis, J.:

> "Appellants argue that the decision in Mapp v. Ohio (367 U.S. 643), in 1961, deprived the States of the power reserved to them in Schwartz v. Texas (supra) to give effect to their own public policies in this regard. It is said that Mapp v. Ohio overruled Schwartz v. Texas by reading the exclusionary rule into section 605 of the Federal Communications Act, as, by analogy, it was read by Mapp into the Fourth Amendment, which was held to have been mandated on the States (in this respect) by the Fourteenth Amendment to the Constitution of the United States.
>
> The identical result does not necessarily follow in case of divulging telephone conversations in violation of section 605 of the Federal Communications Act, inasmuch as a statute may not possess the sanction of a constitutional inhibition protecting against fundamental rights granting immunity from unreasonable search and seizure."

New York's rule (vide *Dinan, supra*) has the concurrence of the respected United States Court of Appeals for the Second Circuit.

In *United States ex rel. Graziano* v. *McMann, Warden*, 275 F. 2d 284 (1960), the Court of Appeals unanimously affirmed an order which denied a petition for a Federal writ

of habeas corpus brought on by a defendant whose conviction in a New York Court had been affirmed by the Appellate Division (3 App. Div. 2d 1010) and the Court of Appeals, (4 N.Y. 2d 881), and to whom this Court had denied certiorari (358 U.S. 851). The petition for the writ of habeas corpus was grounded upon a contention that evidence obtained as a result of a wiretap made pursuant to Court order under Code Crim. Pro. Section 813-a had been improperly admitted against him in the State Court trial. Waterman, C.J. wrote for a unanimous Court:

> "We have no difficulty in unanimously affirming the District Court, despite the fact that evidence presented against appellant was obtained and divulged in violation of 47 U.S.C.A. Section 605. We believe that Schwartz v. State of Texas, 1952, 344 U.S. 199, 73 S. Ct. 232, 96 L. ed. 231, is complete authority for the result we reach. Provided it has logical reference to the proof required to establish guilt, wiretap evidence obtained by New York State officers who have been affirmatively authorized to tap pursuant to Section 813-a of the State Code of Criminal Procedure is held by the New York Court of Appeals to be admissible in criminal cases in the New York Courts. People v. Variano, 1959, 5 N.Y. 2d 391, 185 N.Y.S 2d 1, 157 N.E. 2d 857; People v. Saperstein, 1957, 2 N.Y. 2d 210, 159 N.Y.S. 2d 160, 140 N.E. 2d 252. Cf. People v. Dinan, 2nd Dept., 1958, 7 A.D. 2d 119, 181 N.Y.S. 2d 122, Affirmed 1959, 6 N.Y. 2d 715, 185 N.Y.S. 2d 806, 158 N.E. 2d 501, certiorari denied 1959, 361 U.S. 839, 80 S. Ct. 71, 4 L. ed. 2d 78. Even though, unless authorized by the sender, evidence obtained by intercepted wiretap would be clearly inadmissible in a federal court, Nardone v. United States, 1937, 302 U.S. 379, 58 S. Ct. 275, 82 L. ed. 314; Weiss v. United States, 1939, 308 U. S. 321, 329, 60 S. Ct. 269, 84 L. ed.

298, introduction of the identical wiretap evidence in New York State Courts, although clearly violative of the federal prohibitory statute, is not thereby prevented. Wolf v. People of State of Colorado, 1949, 338 U.S. 25, 69 S. Ct. 1359, 93 L. ed. 1782; Weeks v. United States, 1914, 232 U. S. 383, 34 S. Ct. 341, 58 L. ed. 652. Cf. Benanti v. United States, 1957, 355 U.S. 96 at page 101, 78 S. Ct. 155, 2 L. ed. 2d 126.

As was stated in Schwartz v. State of Texas, supra, 344 U.S. at page 201, 73 S. Ct. at page 234 '(e)nforcement of the statutory prohibition in Section 605 can be achieved under the penal provisions of Section 501.'

There was no denial of any constitutional right. Schwartz v. State of Texas, supra. Appellant cannot be heard to complain because the wiretap communications were divulged and were of assistance in convicting him.

Affirmed."

It bears repetition that Waterman, C.J. in reliance on *Schwartz* v. *Texas*, *supra*, stated:

"There was no denial of any constitutional right."

It is also to be noted that the case was decided after *Benanti* and in evident construction and adoption of that case as authority.

Petitioner struggles but, we submit, in vain, to escape the force of *Pugach* v. *Dollinger*, 365 U.S. 458, 5 L. ed. 2d 678, 81 S. Ct. 650 in which this Court affirmed a judgment of the Court of Appeals for the Second Circuit, 277 F. 2d 739, which in turn had affirmed a dismissal by the United States District Court for the Southern District of New York, 180

F.S. 66 of a complaint which sought an injunction against the introduction upon a State Court criminal trial of evidence procured through telephone wiretapping. This Court's brief *per curiam* opinion:

> "The judgment is affirmed on the authority of Schwartz v. Texas, 344 U.S. 199, 97 L. ed. 231, 73 S. Ct. 232 and Stefaneli v. Minard, 342 U.S. 179, 96 L. ed. 138, 72 S. Ct. 118."

is as dispositive of the question as would be reams of writing on the subject. As we have demonstrated, *Schwartz* v. *Texas*, *supra*, explicitly held that it was not the intention of Congress in enacting Section 605 to bar the introduction of wiretap evidence in State Court trials. When, therefore, this Court in *Pugach*, *supra*, affirmed on the authority of *Schwartz*, *supra*, it by necessary and inescapable inference reaffirmed its construction of Section 605.

In the light of this judicial history, it seems peculiarly, and particularly inapposite, to put it mildly, that petitioner should characterize New York's rulings as giving rise to an "all—but grotesque sort of situation."

The judicial and legislative history which we have outlined as our premise completely justifies the conclusion which we now express. It is: if the Fourth and Fifth Amendments to the Federal Constitution and Section 605 of the Federal Communications Act do not bar the reception in a State trial of wiretap evidence, then certainly they do not render unconstitutional the State statute,—Code Crim. Pro. Section 813-a,—whose sole and obvious purpose is so judicially to safeguard the procurement of such evidence as to reduce to the barest possible minimum the danger of unwarranted intrusion upon the privacy of inno-

cent citizens and at the same time to insure in the greatest possible maximum effect the prosecution of criminals.

Nor is there validity in petitioner's argument that New York's eavesdropping legislation, Penal Law Section 738, evidences an intention to limit the operability of Section 813-a as (in petitioner's words) "an explicit effort to show constitutional respect for Mapp and Benanti".

That section provides:

> "Section 738. Eavesdropping.
>
> A person:
>
> 1. Not a sender or receiver of a telephone or telegraph communication who wilfully and by means of instrument overhears or records a telephone or telegraph communication, or who aids, authorizes, employs, procures or permits another to so do, without the consent of either a sender or receiver thereof; or • • •
>
> 2. • • •; or • • •
>
> 3. • • •;
>
> is guilty of eavesdropping,"

a crime which by Section 740 is constituted as a felony punishable by imprisonment for not more than two years.

What petitioner fails to note, however, is that Section 739 specifically exempts from the provisions of Section 738:

> "1. Eavesdropping pursuant to an ex parte order granted pursuant to Section eight hundred thirteen-a of the Code of Criminal Procedure."

It is thus evident that far from intending to limit the operability of Section 813-a, New York's Legislature speci-

fically implemented an obvious intention to permit the continued operability of Section 813-a under the aegis of carefully issued Court orders.

Petitioner's reference (p. 21 of his brief) to Code Crim. Pro. Section 791 is puzzling in its lack of appositness. That section defines a search warrant and the sections which follow (792-813 inclusive) regulate the issuance of search warrants. These statutes obviously refer to, and are in implementation of, New York's own Constitution, Article 1, Section 12, providing in part:

> "The right of the people to be secured in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,"

and being identical with the Fourth Amendment of the Federal Constitution. They can therefore have no relation to a Federal statute such as Section 605, from the exclusionary operation of which the States are specifically exempted by this Court. *Schwartz* v. *Texas, supra; Benanti* v. *United States, supra; People* v. *Dinan, supra; United States ex rel. Graziano* v. *McMann, supra.*

Lastly, we turn to petitioner's reference to N.Y.C. P.L.R. Section 4506. This statute excludes from reception in either civil or criminal trials "evidence obtained by any act of eavesdropping, in violation of Section seven hundred thirty-eight of the Penal Law, or by any act in violation of Section eight hundred thirteen-b of the Code of Criminal Procedure, *or by eavesdropping without Court order, as permitted by said section of the Code of Criminal Procedure,* when an

application for such order is thereafter made as required by said section but is denied, and evidence obtained through or resulting from information obtained by any such act * * *." (Italics ours) It is, however, so clear as not to need argument that wiretapping pursuant to the authorization of a Court order does not violate Code Crim. Pro. Section 813-b which regulates the provisions for the procurement of a wiretap or eavesdropping order under Section 813-a. This Court will have no difficulty, we are certain, in recognizing all of these references in their true character of window dressing. The Court will have equally little difficulty in therefore rejecting the contention, in itself no more than wishful thinking, that these statutes "were adopted in 1962 by the New York State Legislature in an explicit effort to show constitutional respect for Mapp and Benanti" (his brief, p. 21).

CONCLUSION

The petition for the writ of certiorari should be denied.

Dated: Brooklyn, New York,
December 1963.

Respectfully submitted,

EDWARD S. SILVER
District Attorney
Kings County

WILLIAM I. SIEGEL
Assistant District Attorney
Of Counsel.

APPENDIX A

Argument on Motion to Vacate and Set Aside Ex Parte Order, etc.

SUPREME COURT, KINGS COUNTY

SPECIAL TERM—PART X.

THE PEOPLE OF THE STATE OF NEW YORK,

—against—

CARL I. COHEN,

Defendant.

(Ind. No. 4028/60; 4029/60; 4146/60; 4280/60; 4281/60.)

Brooklyn, New York
January 30, 1963.

Before:

HON. GEORGE A. ARKWRIGHT,

Justice.

Appearances:

EDWARD S. SILVER, Esq.
District Attorney, Kings County
By: William Siegel, Esq., of Counsel

WILLIAM W. KLEINMAN, Esq.
Attorney for Defendant,
Eugene Gold, Esq., of Counsel

SEYMOUR FRIEDMAN,
Official Court Reporter

Appendix A—Argument on Motion to Vacate and Set Aside Ex Parte Order, etc.

Mr. Gold: This is an application, your Honor, to vacate and set aside an *ex parte* order of the Supreme Court, issued by a judge of the Supreme Court who no longer presides, pursuant to Section 813-a of the Code of Criminal Procedure, authorizing the interception of telephone communication on telephone number BE 6-3333, which had been issued by the Telephone Company to one Carl I. Cohen, the defendant in this matter.

An application had been made by the district attorney to the Supreme Court requesting that he be permitted to intercept telephone communications and, pursuant to that application, under section 813-a, the application was granted, and on July 28, 1960 such an order issued from this court.

I say now by way of emphasis, your Honor, that that order was issued pursuant to the authority of the Code of Criminal Procedure ex parte. Section 813-a provides, in part, that an order for the interception of telephone communications cannot be granted unless there is submitted to the supreme court judge at the time of the application sufficient evidence which indicates to the presiding judge that there is reasonable ground to believe that evidence of crime may be thus obtained. The latter portion of what I just said is a quote directly from the statute, your Honor.

The contention that we make here is that at the time of the application on July 28, 1960 there was no evidence before the Court which caused it to have reasonable ground that evidence of crime may be obtained by the interception of telephone communications.

The Court: Was there a record made at that time?

Mr. Gold: This is something the defendant does not know, your Honor.

The Court: Well, when you make the statement that at the time of the application there was no evidence before the Court, what is the basis for your statement?

Mr. Gold: The basis for the statement, your Honor, is this: On September 2, 1960 the defendant was arrested and charged with the crime of abortion. This arrest was approximately five weeks after the issuance of the court order authorizing a wire tap and at the arraignment in Felony Court of the defendant, who is a doctor, the district attorney who was there at that time stated in open court that the defendant had been under surveillance for a substantial period of time prior to the arrest.

The Court: You say this was stated in open court. Is there a record of that?

Mr. Gold: This is something that I am not aware of. It appeared in every newspaper in the City of New York.

The Court: If there was a record, I want to see the record. What you are saying now is just statement. You do not know anything about it, do you?

Mr. Gold: I know this, your Honor, that we had read in the newspapers at the time of the arrest, and in every newspaper, the precise quote that I make to your Honor that was made by the assistant district attorney as related at that time. And, as a matter of fact, I repeated this on April 12, 1961—

The Court: Well, even if you repeated it, that would not improve it.

Appendix A—Argument on Motion to Vacate and Set Aside Ex Parte Order, etc.

Mr. Gold: I say without contravention before Judge Rinaldi, and I will come to that, if I may, your Honor, in just a moment. But, the district attorney at that time—

The Court: Who signed the ex parte order?

Mr. Gold: Judge Keogh.

The district attorney stated at the time of the arrest of the defendant that he had been under surveillance for quite a substantial period of time and that, as a result of this surveillance, many women patients of Dr. Cohen had been interviewed and the result of these interviews proved futile; that each of the women interviewed indicated to the district attorney that they had not been aborted by the defendant Carl Cohen.

What I should like to point out to your Honor is this. If the district attorney's version prior to the arrest of the defendant indicated that he had not committed the crime of abortion, and the purpose of the wire tap order was to obtain evidence concerning the crime of abortion, then I would submit that the conclusion is inescapable: that there was no reasonable ground to believe that he would obtain evidence of the crime of abortion by the telephone interceptions.

May I say this to your Honor as well. Under the procedure outlined in Section 813-a of the Code of Criminal Procedure, there is no provision for the defendant to obtain either copies of the affidavits that are submitted—as a matter of fact, he is not aware that the application is being made, because these applications are made ex parte and so, of course, it is quite impossible for the defense to know, at least, at this time, what affidavits were submitted to the court, what measure of proof was before the court. But it seems to me that there is a responsibility on the part of

not only the district attorney but of the court to not only have the proper degree, the modicum, of proof at the time of the application, but that this may be reviewed at a subsequent time.

Now, I readily concede, your Honor, as the district attorney has so ably stated in his reply affidavit, that there is no provision in the Code of Criminal Procedure for a review of this ex parte application. There is no question about that. But I would submit this to your Honor, that under the circumstances of the Code of Criminal Procedure and the application being made ex parte, the defendant would have a right to go back before the judge who issued the original order, to have him determine anew whether there was in fact, in the light of new circumstances, sufficient evidence before him to justify the issuance of the original order.

Now, unfortunately here, we are confronted with the situation where the judge who issued the original order no longer is a justice of the Supreme Court. And so, of necessity, we must, as we did, make the application in Part I of the Criminal Term of the Supreme Court. That judge saw fit on a prior occasion to disqualify himself from any proceedings concerning this defendant, and so it has been referred to your Honor. It could not be referred to the judge who originally issued the order.

So that when the district attorney says that there is no provision in Section 813-a, or any other part for that matter, of the Code of Criminal Procedure for a review, we recognize that we cannot go to another judge of co-ordinate jurisdiction and seek to overrule his determination, unless there is some specific provision in law to do so. However,

what we do submit is that we can go back to the same judge.

Now, some reference is made in the reply affidavit, your Honor, to the fact that we may argue before your Honor that, in view of the fact that a review of an order authorizing a search warrant is provided for in the Code of Criminal Procedure, this situation that we have here under 813-a is analogous, and the district attorney quite properly points out that, under Section 807 of the Code of Criminal Procedure, there is a procedure outlined where a defendant may come in before the Supreme Court subsequent to the issuance of an order authorizing a search to be made, and attack the basis upon which the search warrant was issued. That is true.

But may I point out, your Honor, that prior to the enactment of Section 807 of the Code of Criminal Procedure, which was recently enacted, I believe effective July 1 of last year, that it was the practice—the accepted practice—although there was no provision for this kind of review, for a defendant to make an application to review before the judge who issued the order, the issuance of the search warrant, and that this was done despite the fact that the Code of Criminal Procedure was silent on the subject.

Now, what I would submit to your Honor in this regard is this. That despite the fact that the Code of Criminal Procedure has no specific outline of the method to be used to attack the issuance of an order ex parte authorizing the interception of telephone communications, despite the fact of any procedure, inherent in the power of the court is the right to review, by the judge who originally issued such an order, in his own conduct, his own actions.

Since what we are dealing with, your Honor, is a very substantial right of a defendant, of every human being, to remain free from this kind of intrusion, and in the light of the defendant's and the communities' right to remain free from this kind of intrusion, the legislature did see fit to enact Section 813-a of the Code of Criminal Procedure and to provide very specifically and very openly that before an ex parte order of that kind be granted, and I quote, "there is reasonable ground to believe that evidence of crime may thus be obtained."

Now, I would submit to your Honor that if the community is to be protected from frivolous applications for wire tap orders, of necessity the court must retain its inherent power to review such an order when it is issued, and under all of the circumstances it would appear to me, your Honor, and we respectfully submit, that we are entitled to a hearing to determine whether there was before Judge Keogh at the time of the application sufficient evidence submitted to him which caused him to have reasonable ground to believe that evidence of crime may be obtained by the issuance of that order and thereby the interception of telephone communications.

May I conclude, your Honor, with just this one comment? We are dealing in an area where the law of the land and the law of our State is in a constant state of flux. The interception of telephone communications and authorizations for it have been the subject of court decisions for these past few years in the Supreme Court as well as our State courts. I believe there is a recognition on the part of all concerned, both public authorities and defense counsel in general, that if we are to protect the community from this kind of instru-

sion, that some procedure must be adopted where we can restrain the conduct of public officials from the unauthorized and unwarranted use of wire taps.

I am sure your Honor is aware that in 1935, I believe it was, the Congress saw fit to enact Section 605 of the Federal Communications Act which prohibits the divulgence of intercepted telephone communications without the express consent and permission of the sender of the telephone call. I think this was a recognition on the part of the Congress which, to a degree, I suppose, has been imposed upon the States as well, that the public need must be satisfied before a wire tap is authorized.

And so, your Honor, I would say that on the question of the power of this court to review, that the public need is sufficient to warrant this court to exercise its inherent power to review whatever it has done ex parte, and that the burden still rests on the district attorney in the light of the provisions of Section 813-a to submit proof, if necessary de novo, to the court that he was justified in making the application, and that the court was justified in issuing an order authorizing wire taps.

If the mandate of Section 813-a is to be given any meaning at all, it must be that the procedure that we are following here is permitted, and we can only point out to your Honor that we know many instances where, under the issuance of search warrants, orders authorizing a search to be made, that frequently the district attorney has made such applications where there has been insufficient proof to justify the issuance of the order and that the court has seen fit under those circumstances to set aside its own order. Judge

Barshay only recently, in an application I may say that was made by me, your Honor, vacated and set aside a search warrant, an order authorizing a search to be made, where he himself was the issuing judge because the district attorney had failed to submit the required proof to him, and that perhaps there was a misunderstanding or a misinterpretation in the light of the newness of these statutes on both the court's part and the district attorney's part. And that we have the same situation here, your Honor.

What we are dealing with is an area which has not been explored to its ultimate degree, its ultimate extent. Under the circumstances, all the circumstances, I would submit to your Honor that not only does your Honor have the power to review the order that was issued by Judge Keogh, but that your Honor also has the power to direct a hearing to determine whether the evidence that was presented to Judge Keogh at the time on July 28, 1960 was sufficient to justify his conclusion that he had reasonable ground to believe that evidence of a crime would thus be obtained.

Under the circumstances, your Honor, I respectfully request that the relief sought in the notice of motion be granted.

Mr. Siegel: May it please the Court, the method which my young friend has chosen, the method of argument by which he presents his case, compels me to depart for a moment, the briefest moment, from the exact merits of the motion, because I have to answer a philosophic disquisition on his part, which really has no proper place in the argument of this motion. Whether or not wire tapping is a proper method of the enforcement of the criminal law will be debated, as

it has been debated, for months and for years to come, and people can reasonably differ about that. That there is a strong point of view that it should not be done is shown by the enactment by Congress of Section 605, as it is familiarly known, to which Mr. Gold has referred. But the important fact is that in the State of New York wire tap or evidence received through a wire tap is still admissible. Our own Court of Appeals has ruled in that fashion and specifically on that point as recently as People v. Dinan, 11 N. Y. 2d.

So that whatever time Mr. Gold has occupied in presenting his philosophical point of view to your Honor, while it is quite interesting and while it is very ably presented, is still outside the confines of this motion.

Now I address myself to the motion. The district attorney has two answers to it. The first is that there is no procedure which authorizes the motion. The right of a justice of the Supreme Court to issue an order permitting the interception of messages on a telephone, popularly known as wire tap, is established by the legislature. That is Section 813-a of the Code of Criminal procedure.

That statute, as your Honor will find when you read it, throws many safeguards around the person in whose name the telephone is registered. It cannot be made by anybody at all. The application must be made by the district attorney or the attorney general or one of their assistants, or a police officer over a certain rank. It cannot be made by just any policeman. I think it must be of the rank of sergeant or higher.

The Court must be satisfied from the moving affidavits "that there is reasonable ground to believe that evidence

of crime may be thus obtained." Therefore, the wide discretion which the legislature has given to a justice of the Supreme Court in the issuance of the order at the same time has guides to enable him to decide whether or not and how he could employ his discretion. But the legislature has nowhere said that this exercise of discretion by the issuance of such an order may be reviewed. And there are considerations which show that it should not be reviewed by any other justice of the court, and I think even by the justice issuing it, although that may be a debatable proposition.

In every other instance where the legislature deemed that a defendant should have a right of review of an order which in its issuance was ex parte, not on notice to him, there is a statutory provision. Thus, we can go in and get a search warrant ex parte, but the defendant knows of the existence of that because his home is reached under the search warrant, or some premise belonging to him, or his property is taken. Therefore, he is on notice that there is a search warrant, even though he was never on notice that a search warrant would be applied for.

That is not the case here. It is only by the merest accident that this defendant or any other defendant may learn of the existence of this wire tap order. In the generality of cases he never knows of it until he comes to trial and the product of the wire tap is introduced, and legally, so, in evidence against him.

Now, if it is only by the merest accident that a defendant may ever know of the existence of a wire tap order, how can it logically, legally and even philosophically be argued that the legislature ever intended that he should have a

right of review? The administration of law is not based on accident. It is based and consists of rules for the governments of those which usually have them.

I think that alone would be a sufficient answer to this very ingenuous, I must say, rather than ingenious, argument of my young friend. That is answer number one, that there is no provision by statute, therefore there is no power in the court.

I think that disposes of the concomitant argument that because Mr. Justice Keogh is no longer sitting, some other justice of this court should review his action. Let's assume that he is sitting or was sitting. Certainly the application couldn't be made to anybody else because that would amount to seeking appellate review by a judge of co-ordinate jurisdiction of the acts of a judge of the same jurisdiction.

Now, that is on the procedure, and I am very confident, your Honor, and very sincere in my argument, there is no proper procedure. But I will assume for the moment that you may decide the motion is properly before you. I am going to hand up—I am not going to disclose—the contents of the supporting affidavits because that which the law said should have been secret when first handed to the court should remain secret. I am going to hand to your Honor the original order and the affidavits on which it is based. Section 813-a provides that once the order is issued it does not stay in the court. It goes to the person authorized to make the interception and that is his authority for doing so.

I am confident, when you read the suporting affidavit, you will conclude that there was more than ample proof, more than just reasonable cause to believe, but ample proof for Mr. Justice Keogh to believe that if we were permitted to

tap the wires, we would or we might—we don't have to assure the Court; only have to show the Court that there is a reasonable probability that evidence of the commission of a crime will thus be received.

And then I want to make one request of the Court. I cannot conceive of your Honor granting this motion on either one and certainly on both of the grounds that I have advanced, but if the improbable, from my point of view, should occur and your Honor does grant the motion, I do think we are entitled to ask you not to divulge the contents of those affidavits.

The Court: Yes.

Mr. Siegel: They constitute evidence.

The Court: That is entirely proper.

Mr. Siegel: Or the names of the person mentioned.

The Court: That is entirely proper.

Mr. Siegel: They constitute evidence on behalf of the district attorney, to which the defendant is not entitled in advance of trial.

We, therefore, respectfully submit that the motion should be denied in toto.

The Court: Do you want any time to put in any brief or anything?

Mr. Gold: There is no law on the subject, your Honor, unfortunately. I am not aware, as a matter of fact, of any application of this kind having been made prior to this one. Am I correct in that, Mr. Siegel?

Mr. Siegel: I have had a very short experience, your Honor. I have been chief of the appeals bureau for only thirteen years, but during those thirteen years no such application has come to my attention. I don't think we could submit any authority to you.

Mr. Gold: We do have a novel question, your Honor. If I may just say one thing in a short reply to Mr. Siegel's argument that he has presented to your Honor?

The original affidavit or affidavits, whatever they may be, which were before the court at the time the ex parte application was granted, I would respectfully submit to your Honor that more than just the mere affidavit is required under the mandate of Section 813-a; that the affidavit itself is insufficient. There must be evidence. "Evidence" to my mind means some kind of testimony in a situation of this kind, because I think your Honor is well aware, with your long experience as a judge of this court, that what appears in affidavits occasionally turns out differently when the witness takes the stand to testify, especially when he is subjected to examination, either cross-examination or examination by the Court.

The Court: You wouldn't expect there to be cross-examination on an application of that kind.

Mr. Gold: No, I would not, but it seems to me that the possibility might arise that the Court might ask the witness or witnesses questions which may lead it to believe, despite an affidavit, that there is not sufficient grounds to believe that evidence of crime may be obtained.

The Court: In other words, you think there must be a hearing?

Mr. Gold: That is right.

The Court: To the extent that the person who is supporting, or the persons supporting, the application should take the stand and testify?

Mr. Gold: That is correct, your Honor. That is my submission and I would submit to your Honor that the same requirement is implied.

The Court: It would be rather cumbersome, wouldn't it? Sometimes you require dispatch in these matters.

Mr. Gold: Well, no, your Honor, that would not be the fact because section 813-b of the Code of Criminal Procedure provides the so called hot-pursuit section; that where the authorities are in hot pursuit of the commission of crime, they may tap without a court order.

The Court: It might not be that hot.

Mr. Gold: The point is this—

The Court: And yet not so slow as the other method that you propose.

Mr. Gold: No, I don't think so, your Honor. Section 813-b covers precisely that situation because it authorizes a wire tap for a substantial period of time without a court order, so long as a court order is thereafter obtained to justify the original wire tap.

May I say this as well? Although the procedure may be to a degree cumbersome, the legislature has seen fit—

The Court: At times aren't some of these orders presented to a judge maybe at his home?

Mr. Gold: Under the Code of Criminal Procedure, this would be entirely unnecessary. There is time provided in the code for the application to be made in court, that it does not interfere with the proposed wire tap because they can wire tap without the court order where there is crime being committed, and then come in and apply for the court order and then the order may be granted which would then justify the initial wire tap without the court order.

But I think, your Honor, that this thing must be remembered—

The Court: I don't think much of your argument at this time in regard to having what might amount to a hearing.

Mr. Gold: Well, your Honor, may I just say this? If the legislature has seen fit to make wire tapping without a court order a felony, and that is a rather serious crime, to wire tap without a court order, so, therefore, I would say that it seems that the legislature envisioned some sort of procedure which would protect the community and that the mere affidavit alone, without something to support it—perhaps, not a hearing—but so long as it is something to support the affidavit without the bald assertions which, maybe, go into affidavits, as we know they sometimes do, the conclusions that are concluded. The statute says evidence. This I think is the key word.

The Court: I will take a look at it. Neither one wants to submit anything in the way of a brief?

Mr. Siegel: No, I don't think we could find anything.

The Court: I will reserve decision.

Mr. Siegel: Your Honor, before we conclude could I say just one word? I don't want to subject you to an interminable round of statement and answer.

Mr. Gold: I promise not to answer.

Mr. Siegel: There is one pithy statement made by Mr. Gold. I like his method of expression, but I want to expose the fallacy in it. He says the community. The legislature by making it a felony to wire tap indicates an intention to protect the community against unauthorized wire tap. I agree with that. The protection is the prosecution of the unauthorized wire tapper. It does not go to the extent of subjecting an authorized wire tapper, authorized by an

order of the court, to interminable proceedings of inquisition and inquiry by a counsel or a defendant who just by the merest accident learned that there was a wire tap.

The Court: All right.